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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-198

THE SUPREME COURT OF VIRGINIA
and
LAWRENCE W. I'ANSON,
In His Personal and Official Capacity
As Chief Justice of the Supreme Court of Virginia,
Appellants,

v.

CONSUMERS UNION
OF THE UNITED STATES, INC., et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

MOTION TO DISMISS OR AFFIRM

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LAWRENCE W. I'ANSON,
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As Chief Justice of the Supreme Court of Virginia,

Appellants,

v.

CONSUMERS UNION
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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

MOTION TO DISMISS OR AFFIRM

Appellees move this Court to dismiss the appeal herein or to affirm the judgment of the United States District Court for the Eastern District of Virginia on the grounds that the court lacks jurisdiction over some of the questions

raised on appeal and that all of the questions raised are so unsubstantial as not to warrant further argument.

QUESTIONS PRESENTED

1. Can the Virginia Supreme Court raise new arguments on appeal to the Supreme Court to overturn a district court order which the Virginia Supreme Court itself proposed?

2. Does judicial immunity preclude a district court from declaring Disciplinary Rule 2-102(A)(6) of the Virginia Code of Professional Responsibility unconstitutional on its face and from enjoining the Virginia Supreme Court from enforcing the Rule?

3. Did Congress abolish judicial immunity from awards granted under the Civil Rights Attorney's Fees Awards Act?

4. Did the District Court abuse its discretion by awarding fees against the Virginia Supreme Court, even though no special circumstances render such an award unjust?

STATEMENT OF THE CASE

On February 27, 1975, Consumers Union of United States, Inc. ("Consumers Union") and Virginia Citizens Consumer Council, appellees, brought this suit under the first and fourteenth amendments and 42 U.S.C. Section 1983. Their complaint alleged that Disciplinary Rule 2-102(A)(6) of the Virginia Code of Professional Responsibility ("the Rule") infringes on their rights to gather and publish, and their members' right to receive, important factual information about services offered by individual lawyers. They requested (1) the convening of a three-judge court; (2) a declaratory judgment that the Rule is unconstitutional on its face and as applied by defendants

to restrict the gathering of information for and publication of plaintiffs' proposed Arlington County, Virginia, directory of lawyers' services, and (3) an injunction enjoining the Virginia Supreme Court ("Virginia Court") from enforcing the Rule.

A three-judge district court was convened on April 14, 1975. On May 8, 1979, that court granted plaintiffs all the relief sought in their complaint, with one exception. Defendants were not enjoined from enforcing the rule with respect to information on fees charged by attorneys, other than an initial consultation fee. The Court explicitly enjoined all defendants from enforcing the Rule to the extent that the Rule infringed on constitutional rights.

Both parties appealed. While the appeals were pending, this Court decided *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), which established that the advertising of information regarding fees for routine legal services enjoys constitutional protection. Two days after the *Bates* decision, this Court vacated the district court decision in this case and remanded for a decision consistent with *Bates*.

On remand, defendants conceded plaintiffs' entitlement to the relief sought in their complaint and filed a proposed Order (App. 1a) which stated:

> ADJUDGED AND ORDERED that the prayers of the complaint, as amended, as to the State defendants, be and they are hereby granted . . . and, to that extent, defendants, their successors in office, their agents and attorneys, be and they are hereby, permanently enjoined and restrained from enforcement of rules and regulations issued by defendants, insofar as such rules and regulations prohibit lawyers practicing in the

Commonwealth of Virginia from providing such information to plaintiffs for publication.

On May 8, 1979, the district court ruled that plaintiffs' entire directory, as amended, is constitutionally protected and that Disciplinary Rule 2-102(A)(6) is unconstitutional on its face, and enjoined both defendants from enforcing the Rule. After explaining its reasons for rejecting each of defendants' arguments that special circumstances rendered an award against the Virginia Court unjust, the Court directed the Virginia Court to pay plaintiffs' costs and reasonable attorneys' fees. The court permitted plaintiffs 30 days to file a motion claiming a specific award of fees. No decision has yet been rendered on plaintiffs' motion which was pending when appellants' jurisdictional statement was filed. No fees were awarded against the Virginia Bar because the district court found that the Bar had made efforts to amend the rule to conform to what the Bar perceived as constitutional requirements, but was unable to do so because of opposition from the Virginia Court. The district court noted that similar circumstances were not present to render an award against the Virginia Court unjust. It observed, further, that the Virginia Court had yet to amend the Rule to conform with the clear constitutional requirements of *Bates*, a decision handed down more than twenty months earlier.

The Virginia Court petitioned the district court for a rehearing, claiming that "since Bates was decided the Virginia Court has been presented with no opportunity to change the rules" because the Virginia Bar had submitted no proposed amendments to the advertising provisions.[1] The petition for rehearing was denied May 30, 1979.

[1] Memorandum in Support of Petition for Rehearing at 13.

MOTION TO DISMISS

I. THIS COURT LACKS JURISDICTION OVER THE CHIEF JUSTICE'S APPEAL IN HIS PERSONAL CAPACITY FROM THE FEE AWARD.

The district court awarded fees against the Chief Justice of the Virginia Supreme Court in his official, but not in his personal, capacity. Thus, the Chief Justice's appeal in his personal capacity from that award should be dismissed.

II. THE VIRGINIA COURT CANNOT CONTEST FOR THE FIRST TIME ON APPEAL AN ORDER IT PROPOSED TO THE DISTRICT COURT.

Throughout the more than four years of litigation that preceeded the district court decision, the Virginia Court never claimed or even suggested that judicial immunity shields it from the declaratory or injunctive relief plaintiffs sought. To the contrary, the Virginia Court *conceded* the propriety of such relief by submitting to the district court a proposed order that, if adopted, would declare the Rule unconstitutional on its face and enjoin the Virginia Court from enforcing the Rule. After oral argument on remand, at which defendants strongly urged the district court to adopt their proposed order rather than plaintiffs', the district court issued an order that, like defendants' Order, declares the Rule unconstitutional on its face and enjoins the Virginia Court from enforcing the Rule. Now, on appeal to the Supreme Court, the Virginia Court challenges the very order it proposed.

By failing to raise their defense earlier, and by proposing the very relief they now contest, appellants waived any immunity from declaratory or injunctive relief that they might be held to enjoy.[2] *See, Helvering v. Wood*,

[2] Appellees believe no such judicial immunity exists, *see* pp. 7-12, *infra*.

309 U.S. 344, 348-9 (1940); *California v. Taylor*, 353 U.S. 553, 556 n. 2 (1957).

Moreover, they cannot raise new immunity defenses on appeal to the Supreme Court, because, as explained in *Duignan v. United States*, 274 U.S. 195, 200 (1927):

> [t]his court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.

Accord, Helvering v. Wood, supra. See Youakim v. Miller, 425 U.S. 231, 234-235 (1976). *See Singleton v. Wulff*, 428 U.S. 106, 121 (1976). No extraordinary circumstances are presented by this case. No injustice will result if this Court declines to review the decision below, because the district court, without any doubt, properly found the Rule to be unconstitutional on its face. *See Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (See especially the concurring opinion of Black, J.,); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)[3] The Rule, therefore, cannot be enforced by the Virginia Court, *Ex Parte Virginia*, 100 U.S. 339, 348 (1879), so that dismissal of this appeal on the merits will merely require the Virginia

[3] By permitting only specified – very limited – information in attorney directories, the Rule prohibits the publication of a significant amount of constitutionally protected information regarding attorneys' services, some of which was at issue in this case, and even less of which was at issue in *Bates*. To declare the Rule unconstitutional only as applied to plaintiffs would leave in effect a statute capable of many unconstitutional applications, so that the district court correctly found this overbroad Rule to be unconstitutional on its face. *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Smith v. California*, 361 U.S. 147, 151 (1959); *Thornhill v. Alabama*, 310 U.S. 88, 96-98 (1940).

Court to do that which it must do anyway to comply with the U.S. Constitution.

Furthermore, as observed in *Goldstein v. Cox*, 396 U.S. 471, 478 (1970):

> [t]his Court has more than once stated that its jurisdiction under the Three-Judge Court Act is to be narrowly construed since 'any loose construction of the requirements of [the Act] would defeat the purposes of Congress . . . to keep within narrow confines our appellate docket.'

Thus, appellants' new claims on appeal should be dismissed.

MOTION TO AFFIRM

I. JUDICIAL IMMUNITY DOES NOT SHIELD JUDGES FROM A DECLARATORY JUDGMENT AND INJUNCTION ENJOINING ENFORCEMENT OF AN UNCONSTITUTIONAL RULE.

In any event, the district court's declaratory judgment and injunction are so eminently correct that appellants' reversal of their previous position raises no substantial questions.[4] Although judges are absolutely immune from

[4] The Virginia Court certainly does not enjoy judicial immunity from the declaratory judgment that its Disciplinary Rule is unconstitutional, because this Rule was the result of an administrative, rather than judicial act. *See Ex parte Virginia*, 100 U.S. 339 (1879); *Roudebush v. Hartke*, 405 U.S. 15 (1972); *Lynch v. Johnson*, 420 F. 2d 818 (6th Cir. 1970) (cited with approval in *Stump v. Sparkman*, 98 S. Ct. 1099 (1978). The Rule was not a decision in a case litigated before the Court, but instead was issued pursuant

damage awards, *Pierson v. Ray*, 386 U.S. 547 (1967), they are not immune from declaratory and injunctive relief enjoining the enforcement of a statute or rule that is unconstitutional on its face. *See Dombrowski v. Pfister*, 380 U.S. 479 (1965).

Appellants mistakenly contend that the lower courts are divided on this issue. Quite to the contrary, the lower courts, in cases involving litigants who seek to enjoin the enforcement of an unconstitutional statute, uniformly find judicial immunity not to be a barrier to such relief.[5]

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to regulatory powers the Virginia legislature delegated to the Virginia Court. (The Code of Virginia, Section 54-48, provides that "[t]he Supreme Court may, from time to time, prescribe, adopt, promulgate and amend rules and regulations: . . . . (b) Prescribing a code of ethics governing the professional conduct of attorneys-at-law. . . .").

Amicus Conference of Chief Justices erroneously claims that the Virginia Court was not a proper or necessary party to this suit. However, just as administrative agencies are proper and necessary parties to suits challenging their rules and regulations, so too is the Virginia Court a necessary and proper party to this action contesting the constitutionality of its Rule.

[5] *Law Students Civil Rights Research Coun., Inc. v. Wadmond*, 299 F. Supp. 117, 123 (S.D.N.Y. 1969) (Friendly, J.), *reversed on other grounds*, 401 U.S. 154 (1971). ("We fail to perceive what interest would be served by holding federal courts to be powerless to enjoin state officers from acting under a statute that allegedly deprives citizens of rights protected by the Civil Rights Act or promulgating regulations that are alleged to have that result simply because some of them are robed."); *Fowler v. Alexander*, 478 F. 2d 694 (4th Cir. 1973); *Cassidy v. Ceci*, 320 F. Supp. 223 (E.D. Wisc. 1970); *Larsen v. Gallogly*, 361 F. Supp. 305 (D.R.I. 1973), *vacated as moot*, 420 U.S. 904 (1975); *Rakes v. Coleman*, 318 F. Supp. 818 (E.D. Va. 1970); *Boddie v. State of Connecticut*, 286 F. Supp. 968 (D. Conn. 1968), *rev'd on other grounds*, 401 U.S. 371

It is true that injunctive relief has been denied, in some cases, to litigants who raise uncertain constitutional claims to obtain review in federal court of a state court decision on matters committed to the discretion of state courts.[6]

(1970). *Compare Adkins v. Underwood*, 370 F. Supp. 510 (N.D. Ill. 1974) *aff'd on other grounds*, 520 F. 2d 890 (7th Cir. 1975), *cert. denied*, 423 U.S. 1017 (1975).

Lower courts also concur that judges may be enjoined from violating well-established constitutional rights. *United States v. Clark*, 249 F. Supp. 720, 727 (S.D. Ala. 1965) (State judge interfered with rights of black citizens to register to vote and to use public accommodations on equal basis with whites); *Bramlett v. Peterson*, 307 F. Supp. 1311 (M.D. Fla. 1969) (State judge failed to inform indigents of their sixth amendment right to court-appointed counsel); *Phillips v. Cole*, 298 F. Supp. 1049 (N.D. Miss. 1968) (State judge failed to inform juveniles of their sixth amendment right to counsel). *See also United States v. McLeod*, 385 F. 2d 734 (5th Cir. 1967). *Compare Peckham v. Scanlon*, 241 F. 2d 761 (7th Cir. 1957); *Mirvin v. Justices of the Supreme Court*, 415 F. Supp. 1178, 1192 (D. Nev. 1976).

[6] *Mirin v. Justices of the Supreme Court of Nevada*, 415 F. Supp. 1178 (D. Nev. 1976) (after finding appellant's constitutional claims to be entirely without merit, court held that judicial immunity prevented the federal court from reviewing state court decisions finding that appellant had violated state taxicab licensing laws); *Adkins v.. Underwood*, 370 F. Supp. 510 (N.D. Ill. 1974) *aff'd on other grounds*, 520 F. 2d 890 (7th Cir. 1975, *cert. denied*, 423 U.S. 1017 (1975) (plaintiff sought federal court order enjoining the enforcement of a state court decision that plaintiff's wrongful death action could not be brought in Illinois on grounds of forum non conveniens. After noting that the case did not involve a statute unconstitutional on its face, but instead a discretionary state court judgment, the federal court refused to intervene); *Peckham v. Scanlon*, 241 F. 2d 761 (7th Cir. 1957) (after finding a prisoner's constitutional claims to be dubious, court refused to interfere with discretionary state court judgments); *Brown v. Dunne*, 409 F. 2d 341 (7th Cir. 1969) (federal court refused to determine if state

For example, in *Cheramie v. Tucker*, 493 F. 2d 586 (5th Cir. 1974), the plaintiff-appellant sought review of a state court decision which, he alleged, had erroneously held that the defendant was not negligent and had thereby derprived the plaintiff of his due process rights. Refusing to interfere with the discretion of the state court, the federal court found judicial immunity to preclude the relief sought.[7]

court mishandled probate proceedings); *Tate v. Arnold*, 223 F. 2d 782 (8th Cir. 1955) (federal court refused to determine if state judge improperly issued writs of garnishment against appellant); *Falkner v. Blanton*, 488 F.2d 551 (5th Cir. 1974), *cert. denied*, 419 U.S. 1080, *rehearing denied*, 419 U.S. 977 (Douglas, J. dissenting) (federal court refused to determine if probate judge erroneously denied appellant property); *MacKay v. Nesbett*, 285 F. Supp. 498 (D. Ala. 1968), *aff'd*, 412 F. 2d 847 (9th Cir. 1969) (federal court declined to review state court decision to suspend a member of the bar from the practice of law for one year; *Gay v. Heller*, 252 F. 2d 313 (5th Cir. 1958) (judicial immunity found to prevent review of state court probate proceedings).

In some cases involving discretionary state court judgments, federal courts have found that judicial immunity does not prevent declaratory or injunctive relief. *Littleton v. Berbling*, 468 F. 2d 389 (7th Cir. 1972), *rev'd on other grounds sub nom. O'Shea v. Littleton*, 414 U.S. 488 (1974); *Stephen v. Drew*, 359 F. Supp. 746 (E.D. Va. 1970); *Wallace v. McDonald*, 369 F. Supp. 180, 188 (E.D. N.Y. 1973); *United States v. Clark*, 249 F. Supp. 720, 727 (S.D. Ala. 1965); *Bramlett v. Peterson*, 307 F. Supp. 1311, 1321 (M.D. Fla. 1969); *Phillips v. Cole*, 298 F. Supp. 1049 (N.D. Miss. 1968); *DeVita v. Sills*, 422 F. 2d 1172 (3rd Cir. 1970); *Staud v. Stewart*, 366 F. Supp. 1398 (E.D. Pa. 1973), *aff'd*, 547 F. 2d 1164 (3rd Cir. 1977). *See also Jacobson v. Schaefer*, 441 F.2d 127, 130 (7th Cir. 1971); *United States v. McLeod*, 385 F. 2d 734 (5th Cir. 1967).

Thus, the lower courts are divided on whether discretionary state court judgments may be enjoined, but not on whether judges can be enjoined from enforcing unconstitutional statutes or rules.

[7] In *Cheramie v. Tucker*, e.g., 493 F. 2d 586, 588 (5th Cir. 1974), the court acknowledged that other federal courts had issued

And several federal courts, faced with similar suits, also have found judicial immunity to bar injunctive relief where it would disturb the normal processes for review of state court errors.[8] As stated in *Gay v. Heller*, 252 F. 2d 313, 315 (5th Cir. 1958), "[t]he normal way to correct errors in the trial or other disposition of a law suit is by appeal, not by suing the judge."

In contrast, the suit before this Court does not attempt to interfere either with discretionary judgments of a state court or with the normal procedures for review of those judgments. Instead, it merely seeks an injunction enjoining the enforcement of a rule that is clearly unconstitutional on its face. The decision, at issue, merely directs the state court to perform a ministerial act required by the U.S. Constitution. Judicial immunity does not prevent such relief.[9]

Moreover, 42 U.S.C. Section 1983 further confirms that judicial immunity does not lie against an injunction issued pursuant to this Act. As explained in *Mitchum v. Foster*, 407 U.S. 225 (1972), "[t]he very purpose of Section 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action

injunctions against judges which did not interfere with their discretionary functions. However, the *Cheramie* court denied declaratory and injunctive relief because "[i]n the instant case, the requested relief would directly and irrebutably interfere with a discretionary judicial function." *Id* at 588. (footnote omitted).

[8] *Adkins v. Underwood*, 370 F. Supp. 510, 515 (N.D. Ill. 1974), *aff'd on other grounds*, 520 F. 2d 890 (7th Cir. 1975), *cert. denied*, 423 U.S. 1017 (1975). *Gay v. Heller*, 252 F.2d 313, 315 (5th Cir. 1958).

[9] See n. 5, *supra*.

under color of state law, 'whether that action be executive, legislative or *judicial*.' " 407 U.S. at 242 (emphasis added). An injunction enjoining the enforcement of a Rule that is unconstitutional on its face, in violation of Section 1983, falls squarely within the relief authorized by Congress in passing Section 1983. *Law Students Civil Rights Research Coun., Inc. v. Wadmond*, 299 F. Supp. 117, 123 (S.D.N.Y. 1969) (Friendly, J.), *reversed on other grounds*, 401 U.S. 154 (1971). Thus, Section 1983 abolished any judicial immunity which might exist against such injunctive relief. *Mitchum, supra.*

In summary, because this Court's decision in *Dombrowski* establishes that judicial immunity does not shield a state court from a declaratory judgment finding its Rules unconstitutional and an injunction enjoining its enforcement of those Rules, and because this Court's decision in *Mitchum* further establishes that 42 U.S.C. Section 1983 abolished any immunities that might preclude such relief, the district court's decision should be affirmed.

II. THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT ABOLISHED JUDICIAL IMMUNITY.

The appeal from the district court's fee award similarly raises no substantial issue. *Hutto v. Finney*, 437 U.S. 678 (1978), established that *all* state governmental immunities were abolished by Congress for awards granted under the Civil Rights Attorney's Fees Awards Act of 1976:

> The Act itself *could not be broader.* It applies to 'any' action brought to enforce certain civil rights laws. It contains no hint of an exception for States defending injunction actions.

> The legislative history is equally plain: [I]t is intended that the attorneys fees, like other items of costs, will be collected either directly from the official in his official capacity, from funds of his agency or under his control, or from the State or local government [whether or not the agency or government is a named party].

437 U.S. at 694, citing S. Rep. No. 94-1011, at 5. (emphasis added).

In addition, the House Report specifically rejected extending *Pierson v. Ray* judicial immunity from damage awards to fee awards under CRAFAA:[10]

> [I]n some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy.[17] [citing *Pierson v. Ray*, 386 U.S. 547 (1967)]. Consequently awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected. To be sure, in a large number of cases . . . only

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10 *Amicus* Conference of Chief Justices mistakenly suggests that the House Report should not be used to determine Congressional intent because the Senate Bill, rather than the House version, became law. Brief *Amicus Curiae* on Behalf of the Conference of Chief Justices in Support of the Jurisdictional Statement at 14. However, the only difference between the two versions was the statutes under which fees could be awarded. Each used identical language to authorize courts to award fees ("the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.") Thus, the House's statement that this language abolishes judicial immunity is an expression of Congressional intent.

injunctive relief is sought, and prevailing plaintiffs should ordinarily recover their counsel fees.

H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 9 (1976).[11]

Because Section 1988 awards are paid by the state, rather than by judges, Congress' abolition of judicial immunity against fee awards should neither instill fear of personal consequences in judges nor interfere with impartial judicial decisionmaking, and thus does not interfere with the purposes of judicial immunity. *See Bradley v. Fisher*, 80 U.S. (13 Wall) 335, 347 (1871). Instead, such awards serve to assure that precious constitutional rights are adequately protected and to fulfill the objectives of 42 U.S.C. Section 1988.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN AWARDING FEES AGAINST THE VIRGINIA COURT.

Under 42 U.S.C. Section 1988, "the court in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Because prevailing parties act as private attorneys' general vindicating important constitutional right, they are entitled to an award under Section 1988 unless special circumstances would render an award manifestly unjust. S. Rep. No. 94-1011, 94th Cong., 2d Sess. 4 (1976) and H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 9 (1976), citing *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968).

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11 Reviewing this legislative history, the lower courts have held that judicial immunity does not apply to 42 U.S.C. Section 1988. *Alsager v. District Court of Polk City, Iowa*, 447 F. Supp. 572 (S.D. Iowa 1977); *Mudd v. Busse*, Civil No. F 75-12 (N.D. Ill., decided April 7, 1977).

Appellants do not offer any facts that establish special circumstances or suggest that the fee award they contest is manifestly unjust. Instead, they claim that the district court awarded fees solely because the Virginia Court failed to amend its Rule for almost two years after *Bates* established its unconstitutionality and argue that the fee award is improper because they were under no obligation to amend that Rule.[12]

Appellants misread the district court opinion. It was not their extraordinary delay, but the absence of special circumstances, that persuaded the district court to award fees.[13] The district court decision reviews and rejects each of the reasons given by the Virginia Court why an award would be unjust.[14] Finding no special circumstances, the district court was required to and did award fees to plaintiffs.

Indeed, the argument that the Virginia Court properly delayed amending the Rule, even if correct, would not render a fee award against appellants unjust. The district court award falls well within its discretion and should be summarily affirmed.

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12 Jurisdictional Statement at 16.

13 *Id.* at App. 10-12.

14 *Id.*

CONCLUSION

In conclusion, because appellants improperly raise new arguments on appeal to contest a declaratory judgment and injunction they proposed, their appeal should be dismissed. Moreover, because the district court's declaratory judgment, injunction, and award of attorneys fees are so eminently correct, and appellants' judicial immunity arguments so contrary to previous decisions of this Court, the district court's decision should be summarily affirmed.

Respectfully submitted.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

CONSUMERS UNION OF UNITED STATES, INC., et al., Plaintiffs, v. AMERICAN BAR ASSOCIATION, et al., Defendants.	Civil Action No. 75-0105-R

MEMORANDUM AND ORDER

On June 29, 1977, the U.S. Supreme Court vacated the judgment of this Court in the above-captioned case and remanded the case to this Court for further consideration in light of *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). Having reconsidered this matter as ordered by the Supreme Court, Judges Bryan, Merhige and Warriner unanimously adopt and reconfirm the Court's previous order in this case, except insofar as that order did not permit publication by the plaintiffs of certain information as to the fees charged by members of the Bar of Virginia for services.

In light of the decision of the Supreme Court in *Bates, supra*, the Court holds that, pursuant to the First and Fourteenth Amendments, plaintiffs are entitled to gather and publish, and their members are entitled to receive, truthful information as to the fees at which lawyers will per-

form legal services, so long as the information published is not false, misleading or deceptive.

It is therefore now

ADJUDGED AND ORDERED that the prayers of the complaint, as amended, as to the State defendants, be and there are hereby granted; that accordingly the publication described in Appendix A to the affidavit of Mark Silbergeld, dated May 12, 1978, is approved by the Court, and hereby is declared to be valid for publication; and, to that extent, defendants, their successors in office, their agents and attorneys, be and they are hereby, permanently enjoined and restrained from enforcement of rules and regulations issued by defendants, insofar as such rules and regulations prohibit lawyers practicing in the Commonwealth of Virginia from providing such information to plaintiffs for publication.

Let the Clerk send copies of this Memorandum and Order to all counsel of record.

Done this ____ day of _____ , 1978, at Richmond, Virginia.

_____
United States District Judge

_____
United States District Judge

_____
United States District Judge